

STATE OF MICHIGAN
COURT OF APPEALS

WONNIE ALBERT WOOD, Individually and as
Next Friend of JOEL DANIEL WOOD, a Minor,

UNPUBLISHED
April 17, 2003

Plaintiffs-Appellants,

v

No. 234971
Macomb Circuit Court
LC No. 99-002883-NO

HOME DEPOT, U.S.A.,

Defendant-Appellee.

and

JOSEPH MAZURE,

Defendant.

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right the lower court's order granting defendant Home Depot's motion for summary disposition in this premises liability action. We reverse.

This action arose when a cart being transported by the ten-year-old plaintiff Joel Wood, hit an alleged gap in the pavement near the exit door of a Home Depot store, causing two concrete steps to fall out of the cart, injuring Joel. On the day of the incident, Joel accompanied his uncle, defendant Joseph Mazure, to the Home Depot store. On entering the store, Mazure secured a flatbed cart and proceeded to load several items on it. Mazure also intended to purchase several concrete steps, and after realizing they would not fit on the flatbed cart, Mazure secured an upright shopping cart and proceeded to load the steps on the cart. It is undisputed that Mazure loaded the steps on the upright cart. Joel and Mazure proceeded through the store without incident; however, as Joel pulled the upright cart out the exit door, the cart hit an alleged gap in the cement. The cart then apparently tipped forward causing Joel to fall backwards and the concrete steps fell off the cart onto Joel's left leg.

Wonnie Wood, Joel's father, filed a complaint against Home Depot alleging various acts of negligence.¹ Home Depot filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that its alleged negligence did not proximately cause Joel's injuries. Instead, Home Depot claimed it was Mazure who positioned the concrete steps on the upright shopping cart and never asked for assistance; thus, Mazure was liable for Joel's injuries. In response, plaintiffs argued that Home Depot's negligence was a proximate cause of Joel's injuries because its employees had a duty to warn Joel of the danger and failed to do so.

The trial court issued an opinion and order granting Home Depot summary disposition in which it reasoned that although the Home Depot employees knew of the dangerous situation, Mazure refused their assistance. Further, the court found that there was evidence that Home Depot attempted to prevent the incident and that it was actually Mazure who created the dangerous condition in the first place.

A motion brought under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), the trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The court may not make findings of fact or weigh credibility in deciding a motion for summary disposition. *Skinner v Square Deal Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). On appeal, this Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spiek, supra* at 337.

Premises liability cases, like ordinary negligence cases, require the plaintiff to prove: (1) a duty owed to the plaintiff by the defendant, (2) breach of that duty, (3) causation, and (4) damages. *Moning v Alfano*, 400 Mich 425, 437; 254 NW2d 759 (1977). Plaintiffs' claims of negligence are based on Joel's status as a business invitee. With regard to duty, ordinarily, a possessor of land is liable for physical harm caused to his invitees by a condition on the land if he:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. [*Riddle v McLouth Steel Products*, 440 Mich 85, 93; 485 NW2d 676 (1992), quoting 2 Restatement Torts, 2d, § 343, p 215.]

With regard to the causation element, proof of causation requires proof of both factual and proximate cause. *Haliw v City of Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001). Establishing factual causation requires that the harmful result would not have occurred but for the defendant's negligent conduct. *Id.* Whereas, establishing proximate causation

¹ Plaintiffs also filed suit against Joseph Mazure; however, the parties settled this claim and Mazure is not a party to this appeal.

involves the foreseeability of consequences and a determination whether the defendant should be liable for the consequences. *Id.* Proximate cause is usually a factual issue for the jury to determine. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997). When multiple factors contribute to produce the plaintiff's injury, one actor's negligence will be considered a proximate cause of the harm if it was a substantial factor in producing the injury. *Id.* One consideration in determining whether negligent conduct was a substantial factor in producing the injury is the number of other factors that contributed to produce the harm and the extent of the effect that they had in producing it. *Id.*

With regard to the element of duty, in the instant case, Home Depot admitted that the positioning of the cement steps on the upright shopping cart was a dangerous condition. In fact, at oral argument, Home Depot agreed that an employee had a duty to warn an individual if the employee saw that a cart's load was dangerous to either the customer or others. Further, in deposition testimony, several Home Depot employees admitted that there is a duty to warn of a dangerous condition and to attempt to alleviate it. Therefore, under the circumstances, there is no question with regard to whether a duty to warn existed.

The parties disagree, however, with regard to whether Home Depot breached its duty with regard to Joel and whether the alleged breach of duty caused Joel's injuries. In rendering its decision, the trial court conclusively determined that Home Depot had notice of the dangerous condition because an employee walked up to Joel and Mazure while they were in the store and inquired whether Mazure wanted another cart. Further, the court conclusively determined that although a Home Depot employee asked whether Mazure needed help, Mazure refused the assistance. However, the trial court inappropriately made factual determinations in coming to these conclusions. A review of the record shows that the evidence greatly conflicts with regard to whether any Home Depot employee approached Mazure and Joel to inquire whether they needed assistance or to inform them that it was dangerous to have the cement steps loaded on the upright cart. Mazure and Joel both testified at their depositions that no Home Depot employees ever approached them while they were in the store. The conflicting testimony created a genuine issue of material fact with regard to whether Home Depot breached its duty.

Further, although it was Mazure who loaded the cement steps on the upright cart, questions remain with regard to how substantial of a factor Home Depot's actions, or inaction, played in causing Joel's injuries. Mazure testified that if he had been warned that using the upright cart was dangerous, he would have stopped using it. Again, Mazure testified that no Home Depot employee warned him of the danger, but a Home Depot employee testified that Mazure refused help.² Viewing the evidence in the light most favorable to plaintiffs, as the court must do on a motion for summary disposition, there are questions of fact with regard to whether Home Depot, as opposed to Mazure, caused Joel's injuries.

² We also note that another Home Depot employee who actually witnessed Joel's fall testified that he thought the cart was dangerous and he was concerned that the alleged "gap" or uneven pavement near the exit door would cause Joel's cart to upset.

Under the circumstances, the trial court improperly made factual determinations with regard to whether Home Depot breached its duty and whether the breach of that duty caused Joel's injuries.³

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen Fort Hood

³ We note, that in their briefs on appeal, the parties address whether the “open and obvious danger” doctrine applies to a minor. Under the circumstances, because Home Depot admitted that a duty to warn of a dangerous cart load existed, and because the trial court improperly made factual determinations, we decline to address the issue whether the “open and obvious danger” doctrine should apply to a minor.